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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 PATRICK LOWDEN and CHRISTI
12 LOWDEN,

13 Plaintiffs,

14 v.

15 MAGGIE MILLER-STOUT, et al.,

16 Defendants.

CASE NO. C08-5365BHS

ORDER ADOPTING THE
REPORT AND
RECOMMENDATION

17 This matter comes before the Court on the Report and Recommendation of the
18 Honorable Karen L. Strombom, United States Magistrate Judge (Dkt. 50), Plaintiffs’
19 Objections to the Report and Recommendation (Dkt. 51), Defendants’ Response to
20 Plaintiffs’ Objections (Dkt. 56), the Court’s Order to Show Cause (Dkt. 57), and the
21 remainder of the record. The Court hereby adopts the Report and Recommendation as
22 stated herein.

23 **I. FACTUAL AND PROCEDURAL BACKGROUND**

24 **A. Extended Family Visits**

25 In Washington, a prisoner can qualify for an Extended Family Visit (“EFV”) under
26 certain conditions. *See* Washington Department of Correction (“DOC”) Policy 590.100.
27 The history of this policy is explained as follows:
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1 In February 13, 1995, [DOC] 590.100 was revised. The impetus for
2 the new and more stringent revised directive was a serious incident at
3 another correctional facility during an extended family visit. The incident
4 occurred at the Clallam Bay Corrections Center during a family visit on
January 7, 1995. The inmate involved held his spouse at knife point during
an extended family visit, attacked and stabbed her, and held her hostage.
The inmate was shot during the incident.

5 As a result of the Clallam Bay incident, members of the Washington
6 Legislature during the 1995 session introduced a measure that would have
completely precluded extended family visitation in Washington prisons.
7 However, instead of passing such a law, the Washington Legislature passed,
and the Governor signed, House Bill 2010, containing a provision that
8 required the Department of Corrections to develop a uniform policy
governing "the privilege of extended family visitation." *See* RCW
72.09.490.

9 As a result of House Bill 2010, the Division of Prisons revised the
10 directive governing extended family visits, [DOC] 590.100. The revised
directive became effective February 13, 1995. As revised, [DOC] Directive
11 590.100 provides that extended family visits for eligible offenders and their
immediate families must be approved by the Superintendent, who has the
12 authority to approve, deny, suspend, or terminate visits. [DOC] 590.100 ("If
it is determined there is a reason to believe that an offender, although he/she
13 meets all other eligibility requirements, is a danger to him/herself, the
visitor(s), or to the orderly operation of the program, the Superintendent
14 may exclude the offender from the program.").

15 The directive further eliminates "maximum, close custody, and death
row offenders" from participating in the program, and restricts extended
16 family visits in a number of other categories. The directive includes a
restriction that "[o]ffenders may be excluded from participation if they have
17 a documented history of domestic violence against any person."
Additionally, the directive provides that only those spouses who were
18 legally married to the offenders prior to incarceration for the current crime
of conviction are eligible for extended family visitation. *Id.*

19 On February 24, 1995, Tom Rolfs, Director of the Division of
20 Prisons, issued and circulated the new EFV directive as well as a policy
statement governing the implementation of the new EFV directive. In the
21 policy statement, Rolfs expressly recognized the extensiveness of the
directive's significant revisions and encouraged the superintendents to take
22 the necessary steps to ensure that the revised directive be implemented
"with the sensitivity and necessity of its contents in mind." The policy
23 statement provided two guidelines for implementing the newly revised
directive.

24 The first guideline requires the Prison Superintendents to review
25 each inmate currently approved for participation in the EFV program
pursuant to the pre-revision directive to determine if he/she meets the new
26 criteria. It also allows the Superintendent to disapprove any inmate
currently participating who failed to meet the revised directive's provisions.
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1 The second guideline allows the Superintendents to make one-time
2 exceptions for inmates who do not meet the revised directive's
3 requirements. Specifically, this "grandfathering" provision provides the
4 Superintendents with the discretion to approve inmates who had (1) either
5 already been participating in the program, or had made application to the
6 program prior to January 10, 1995, and (2) were determined not to present
7 safety or security concerns for the program or participants. The
8 "grandfathering" clause does not grant the superintendents discretion to
9 consider any other inmate for participation in the program.

10 *Daniel v. Rolfs*, 29 F. Supp. 2d 1184, 1185-86 (E.D. Wash. 1998). It is important to note
11 that, when the *Daniel* court addressed the constitutionality of this policy, the criteria of
12 the grandfathering provision were that the inmate either had made application to the
13 program or had already been participating in the program before January 10, 1995.

14 The current grandfathering provision reads as follows:

15 Offenders who made application **and** were participating in the EFV
16 Program prior to January 10, 1995, may be allowed to continue
17 participation based on the Superintendent's review. Offenders who were
18 grandfathered into the program and lose custody, must reapply and meet
19 current application criteria. This also applies to parole revocations, CCI
20 violators and re-incarcerated offenders. Grandfathering is not allowed for
21 remarriages following a divorce unless authorized by the Prisons Deputy
22 Secretary.

23 DOC Policy 590.100, Directive § V(E)(1) (emphasis added). The current provision
24 regarding marriages states that a spouse "[m]ust have been legally married to the offender
25 prior to conviction and any concurrently or consecutively served conviction." *Id.*, §
26 V(C)(1).

27 **B. Plaintiffs' Requests for an EFV**

28 Patrick Lowden has been incarcerated since March 11, 1994. Dkt. 41 at 1. Mr.
Lowden has participated in the EFV program with his parents and siblings for a number
of years. *See* Dkt. 40 at 1-7.

 Christi Lowden is a free person. *Id.* at 7. The Lowdens were married on April 6,
2006. Dkt. 44 at 26. On September 18, 2007, Mr. Lowden applied for participation in
the EFV program with his wife pursuant to Policy 590.100. Dkt. 1-3 at 9. On September
19, 2007, the DOC denied Mr. Lowden's EFV request because he submitted his request
after January 10, 1995, and he was married after his incarceration. *Id.*

1 **C. The Current Proceedings**

2 On May 15, 2008, Plaintiffs filed a civil rights complaint in the Superior Court of
3 the State of Washington in and for the County of Thurston. Dkt. 1-3 at 7-13. Plaintiffs
4 claim that Defendants' denial of their EFV application is a violation of their right to equal
5 protection of the law under the Fourteenth Amendment. *Id.* at 12-13. On June 6, 2008,
6 Defendants removed the action to this Court. Dkt. 1.

7 On June 12, 2008, Defendants filed a Motion to Dismiss arguing that Plaintiffs
8 have no constitutional right to participate in the EFV program under DOC Policy
9 590.100. Dkt. 3. On August 30, 2008, Judge Strombom renoted the motion as a motion
10 for summary judgment and allowed both parties to submit additional briefing. Dkt. 35.

11 On December 12, 2008, Judge Strombom issued her Report and Recommendation.
12 Dkt. 50. Judge Strombom recommended that the Court should grant Defendants' motion
13 for summary judgment because (1) the "grandfathering provision" did not violate
14 Plaintiffs' right to equal protection, (2) Plaintiffs were not eligible for the "grandfathering
15 provision," and (3) Defendant Vail was entitled to summary judgment for lack of personal
16 participation. *Id.* at 5-12.

17 On January 5, 2009, Plaintiffs filed objections to the Report and Recommendation.
18 Dkt. 51. Plaintiffs specifically objected to Judge Strombom's recommendation that
19 Defendants had not violated Plaintiffs' rights to equal protection (*id.* at 5) and argued that
20 Defendants had not put forth a legitimate penological interest for either DOC Policy
21 590.100 or the "grandfathering provision" of the policy (*Id.* at 8). On January 16, 2009,
22 Defendants responded. Dkt. 56. On February 2, 2009, Plaintiffs replied and requested
23 that the Court reject the Report and Recommendation because of Plaintiffs' "class of one"
24 claim and because the policy is unconstitutional. Dkt. 61 at 3-5.

25 On January 30, 2009, the Court requested additional briefing by ordering the
26 parties to show cause "regarding a legitimate penological reason for the disparate
27 treatment of inmates under DOC 590.100." Dkt. 57 at 3, 6. On February 20, 2009,
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1 Defendants responded (Dkt. 62) and attached the Declaration of Eldon Vail, the Secretary
2 of the DOC (Dkt. 62-2).

3 II. DISCUSSION

4 A. Standard

5 The district court “shall make a de novo determination of those portions of the
6 report . . . to which objection is made,” and “may accept, reject, modify, in whole or in
7 part, the findings or recommendations made by the magistrate.” 28 U.S.C. § 636(b)(1).
8 The district court “may also receive further evidence” on the issues presented. *Id.*

9 B. Equal Protection

10 Plaintiffs argue that DOC Policy violates their rights to equal protection and that
11 Judge Strombom erred in finding that Plaintiffs had failed to state a constitutional
12 violation. For the reasons stated below, the Court finds that Judge Strombom did not err
13 in finding that Plaintiffs have failed to state a constitutional violation of equal protection
14 of the law. The Court will also address Plaintiffs’ arguments regarding “the
15 constitutionality of distinguishing between prisoners who were married before or after
16 ‘conviction’” Dkt. 51 at 9.

17 The Supreme Court has stated that:

18 The purpose of the equal protection clause of the Fourteenth Amendment is
19 to secure every person within the State’s jurisdiction against intentional and
20 arbitrary discrimination, whether occasioned by express terms of a statute
or by its improper execution through duly constituted agents.

21 *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam) (citations and
22 quotation marks omitted). The right to equal protection of the law survives incarceration.
23 *See, e.g., Baumann v. Arizona Dep’t of Corrections*, 754 F.2d 841 (9th Cir. 1985).

24 To succeed on a claim of equal protection, a plaintiff must prove that he has been
25 “intentionally treated differently from others similarly situated and that there is no
26 rational basis for the difference in treatment.” *Olech*, 528 U.S. at 564. This analysis
27 consist of three questions: (1) what are the law’s classifications, (2) what is the
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1 appropriate level of scrutiny, and (3) does the government action meet the level of
2 scrutiny? *See* E. Chemerinsky, Constitutional Law § 9.1, pgs. 643-48 (2nd ed. 2002).

3 **1. DOC Policy 590.100's Classifications**

4 “The first step in equal protection analysis is to identify the [defendants’]
5 classification of groups.” *Country Classic Dairies, Inc. v. State of Montana, Dep't of*
6 *Commerce Milk Control Bureau*, 847 F.2d 593, 596 (9th Cir. 1988). “To accomplish this,
7 a plaintiff can show that the law is applied in a discriminatory manner or imposes
8 different burdens on different classes of people.” *Freeman v. City of Santa Ana*, 68 F.3d
9 1180, 1187 (9th Cir. 1995). The plaintiff must show that he is (1) similarly situated and
10 (2) disparately treated. *See Olech, supra*.

11 **a. Similarly Situated**

12 The Equal Protection Clause denies to “states the power to legislate that different
13 treatment be accorded to persons placed by a statute into different classes on the basis of
14 criteria wholly unrelated to the objective of that statute.” *Reed v. Reed*, 404 U.S. 71, 75-
15 76 (1971). In other words, an individual’s right to equal protection of the law may be
16 violated “[o]nly when a governmental unit adopts a rule that has a special impact on less
17 than all the persons subject to its jurisdiction” *New York City Transit Authority v.*
18 *Beazer*, 440 U.S. 568, 587-88 (1979).

19 In this case, DOC Policy 590.100 is the adopted rule that applies to all inmates
20 under DOC’s control. Mr. Lowden is an inmate under DOC’s control. Therefore, Mr.
21 Lowden has shown that he is similarly situated to all persons subject to the DOC’s
22 jurisdiction.

23 **b. Disparate Treatment**

24 It is uncontested that DOC Policy 590.100 separates inmates according to (1)
25 whether an inmate meets the criteria of the grandfathering provision and (2) whether a
26 spouse meets the criteria of the marriage provision. *See supra*. Therefore, Plaintiffs have
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1 shown that DOC Policy 590.100 disparately treats inmates under its control based on
2 these provisions.

3 It should be noted that the Court was concerned, as was the *Daniel* court, that
4 inmates were classified based solely on the date of his or her application for participation
5 in the program. Dkt. 57; *see also Daniel*, 29 F. Supp. 2d at 1189-92. The basic concern
6 was that inmates who had been participating in the program had shown a proven “track
7 record” of safety and could reasonably be grandfathered into a program that created
8 serious safety issues whereas inmates who merely applied the day before the cutoff date
9 had no proven “track record” of safety but were still allowed to be “grandfathered” into
10 this admittedly unsafe program. The current grandfathering provision, however, states
11 that inmates must have applied for and participated in the EFV program prior to January
12 10, 1995. *See supra*. Thus, Defendants are not directed to classify inmates based on the
13 safety threat an inmate may pose because of the date that he or she submitted his
14 application to participate in the EFV program.

15 Plaintiffs argue that the DOC arbitrarily applies the term “conviction” in the
16 spouse provision. Dkt. 51 at 5; Dkt. 61 at 2-3. Plaintiffs have provided evidence that an
17 inmate was allowed to submit his application for the superintendent’s review even though
18 the inmate was married after his conviction. *See* Dkt. 44 at 22, 24. Evidently the inmate
19 was married before he was sentenced but after he was convicted. *Id.* The DOC admitted
20 that this was contrary to DOC’s Policy, but approved the application. *Id.* at 24.

21 Defendants argue that “the DOC may consider granting a particular policy
22 exception without undermining the proper application of the policy as to the Plaintiffs in
23 the case at bar.” Dkt. 27 at 2-3. Arbitrary application of the law, however, is the essence
24 of equal protection. *See supra*. In this case, the issue is not whether Defendants may
25 grant exceptions to some but not others without legitimate penological interests but that
26 Plaintiffs have no adequate remedy at law if the Court were to declare that this
27 application of DOC Policy 590.100 was in violation of the equal protection clause. For
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1 example, if the Court were to grant injunctive relief such that the DOC must allow
2 inmates to submit EFV application for the superintendent's review if the inmate was
3 married after conviction but before sentencing, Plaintiffs would still not qualify to have
4 their application reviewed by the superintendent under the spouse provision of DOC
5 Policy 590.100. Therefore, for the purposes of this case, this issue is moot.

6 **2. Level of Scrutiny**

7 The Court adopts Judge Strombom's finding that Plaintiffs have failed to allege the
8 violation of a fundamental right or that they are members of a suspect class and that the
9 appropriate level of scrutiny for DOC Policy 590.100 is rational basis review. Dkt. 50.

10 **3. Legitimate Penological Interest**

11 The Court adopts Judge Strombom's finding that Defendants have advanced
12 legitimate penological interests for both the grandfathering clause and the spouse
13 provision of DOC Policy 590.100. Dkt. 50.

14 **C. Conclusion**

15 The Court overrules Plaintiffs' objections to Judge Strombom's Report and
16 Recommendation. Dkts. 51 and 61. Therefore, the Court adopts the Report and
17 Recommendation as stated herein and Defendants' Motion for Summary Judgment is
18 granted because Plaintiffs have failed to allege a constitutional violation under the equal
19 protection clause of the Fourteenth Amendment. Plaintiffs' Cross-Motion for Summary
20 Judgment (Dkt. 55) and Motion for Extension of Time (Dkt. 58) are stricken as moot.


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III. ORDER

Therefore, it is hereby

ORDERED that Plaintiffs' Objections (Dkts. 51 and 61) are **OVERRULED** and the Report and Recommendation (Dkt. 50) is **ADOPTED** as stated herein. Defendants' Motion for Summary Judgment is **GRANTED** and this action is **DISMISSED**.

DATED this 2nd day of March, 2009.


BENJAMIN H. SETTLE
United States District Judge